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Supreme Court of the United States

October Term, 1972

NO. 72-531

THE DOW CHEMICAL COMPANY, *Petitioner*

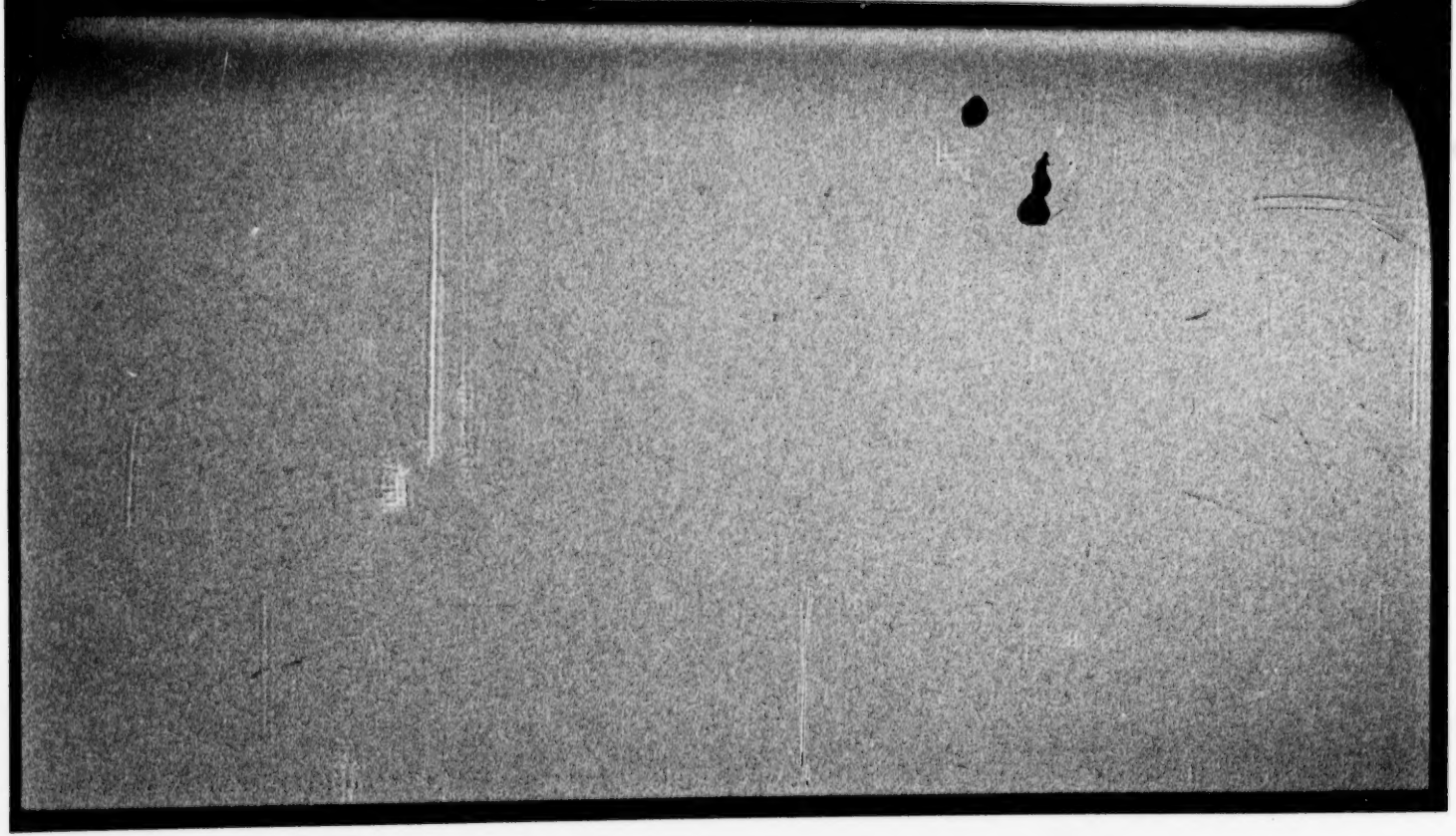
-versus-

DIXIE CARRIERS, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

ROBERT EIKEL
Counsel for Petitioner
1442 Esperson Building
Houston, Texas 77002

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002



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PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner The Dow Chemical Company (hereinafter "Dow") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on July 5, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra, p. A-1) is not yet reported.

The opinion of the District Court (Appendix A, infra, p. A-7) is reported in 330 F.Supp. 1304.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, infra, p. A-1) was entered on July 5, 1972. Rehearing was not sought.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1.

Can a chemical manufacturing company's private canal, from which the public is excluded and which lies wholly within its premises, and which is used as much in the manufacture and sale of its chemical products as are its land, buildings and machinery, be lawfully found "navigable waters of the United States" subject to the governmental control provided for in the Rivers and Harbors Act of 1899, simply because it connects at the seaward end of the Company's premises to the public waterways of the United States where the company's barges are put into commerce?

2.

Is not the subjection of a private canal, lying wholly within the company's premises and maintained by the company and from which the public is effectively excluded by a gate, to the provisions of the Rivers and Harbors Act of 1899 by virtue of its connection outside the gate to public, commercial waters, a judicial taking of private property for public use without compensation contrary to the prohibitions of the Fifth Amendment to the Constitution?

STATUTES AND REGULATIONS INVOLVED

Amendment 5, United States Constitution, the portion thereof reading:

> ". . .; nor shall private property be taken for public use, without just compensation." (U.S.C.A., Const. Amendment 5.)

Rivers and Harbors Act of 1899, Mar. 3, 1899, c. 425, 30 Stat. 1151, Sections 7, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19 and 20 (33 U.S.C.A. §§ 401, 403, 404, 406, 407, 408, 409, 411, 412, 414, 415, 502 and 549, printed in appendix below, pages A-23).

STATEMENT OF THE CASE

Petitioner owns a large tract of land adjacent to the Gulf of Mexico. Between the sea beach and the company's land the Intracoastal Waterway, a public, commercial waterway maintained by the Corps of Engineers, runs. Stipulation, at App. 17-18; Ptf's Exh. 7 (Department of Commerce Nautical Chart No. 887-SC). On its tract of land and on its canal the company has two large chemical manufacturing plants, and for use in the making of its products the company brings to these plants large quantities of seawater through its privately-owned and maintained canal, this canal being dug upon and being wholly within its own property and connecting at its south end to the Gulf of Mexico, through the Intracoastal Canal and the ocean ship fairway from the Gulf to the port of Freeport, Texas. Ptf's. Exh. 7; Tr. 23-24.

The company has a gate across its canal at the public waterways end, which in its raised position this gate skims off the lighter brackish waters of the public Intracoastal

Canal so that almost pure seawater flows to its plants through the deep-sea vessel fairway to the Gulf of Mexico. This seawater is a principal raw material used in the making of petitioner's chemical products. The gate is shown in Ptf's. Exhibits 1 through 6, photographs; Tr. 18. The oral testimony relative to this primary use of the canal for seawater conversion into chemicals, and the operation of the skimmer gate, is reproduced in the transcript, pp. 18-21. The most pertinent parts are reproduced in the footnote below.*

The gate also bars passage into and out of the canal to all vessels except those of the company, and the public has never been allowed to use the canal. App. 18; Ptf's.

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*Tr. 20 "Q. Now, closed to me may have a different meaning. What do you mean by the closed position and open position?
A. We refer to the open position when the gate itself is lowered down to the bottom allowing the tug and barges to pass over the gate.
Q. It is not like then a bascule-type bridge where it is opened above the surface so the vessels can pass along the surface?
A. No, sir.
Q. When it is closed that means no vessels can move through it, of course?
A. That's correct.
Q. What is the reason why the skimmer gate is there and what is the function of it?
A. The purpose of the gate itself is to skim off the less dense water on the surface to allow the salt water, the more dense water, to flow underneath the gate and serve the needs of the plant.
Q. Is the salt water used in the chemical processes of the plant or not?"
Tr. 21 "A. Yes, sir.
Q. Chemicals converted out of the salt water or the salt water constituents form materials used as part of the plant?
A. Used as raw materials, yes, sir."

Exh. 7, on which Department of Commerce Nautical Chart 887-SC is printed:

"BARGE CANAL

"This canal is privately maintained and is not open to the public. The gate at the entrance near Brazos River Lighthouse can be lowered to a depth of 9 feet for a width of 50 feet."

(The pertinent part of this Nautical Chart is attached hereto in the appendix below.)

In addition to the primary use of the canal for seawater, the company uses it for its barges, which bring other raw materials to the plants and take finished products from the plants by barge for delivery on the country's public waterway system to customers. These barges are handled on the canal by two chartered tugs which ply only the canal waters except when handling barges through the gate to other towing vessels. When a barge is to be put upon public waters, the gate is dropped and the company tug delivers the barge to the commercial tug outside the canal. When a barge is brought from public waters into the company's premises and its canal, the gate is again lowered and the company's chartered tug goes through and takes the barge from the commercial tug in public waters and then brings the barge into the private canal. App. 69.

Across its premises the company has granted an easement to a railroad serving its plants, and a railroad bridge crosses the canal. Wooden revetments and fenders on the sides of its canal to protect the bridge footings have been built by petitioner. App. 18. No permits for construction of the bridge and these fenders had been sought

from or granted by the U. S. Engineers pursuant to the requirements of the Rivers and Harbors Act of 1899, App. 18. The action was brought for damages done to these fenders by one of the two Dow chartered tugs.

The trial Court held that the damaged fenders were unlawful for lack of the government permit but allowed petitioner recovery on general tort principles of negligence. It held the canal waters "navigable waters of the United States" and so subject to the provisions of the Rivers and Harbors Act of 1899.

The Court of Appeals affirmed, holding that it was legally sufficient to subject petitioner's private canal to control by the United States Corps of Engineers under the Rivers and Harbors Act of 1899 that it connected with public waters on to which petitioner's barges were passed into commerce.

Against these decisions which subject the usage of its private property to the governmental control of navigable waters of the United States by the United States' designated authority, the Secretary of War (Corps of Engineers), and subject petitioner to all the provisions and possible penalties of the Rivers and Harbors Act of 1899 in its use of its private canal, certiorari is here sought. While petitioner has recovered the money it sought, in allowing it such recovery the Courts below have taken from petitioner an invaluable right, the right of an owner to control and to use his private property as he desires (so long as others are not harmed by such use).

The jurisdiction of the District Court was in admiralty, under Article 3, Section 2, Clause 1 of the Constitution of the United States, and 28 U.S.C. §1333.

ARGUMENT

REASONS FOR GRANTING THE WRIT

1.

In holding a private waterway "navigable waters of the United States" and thus subject to governmental control pursuant to the provisions of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §§401 et seq.), the Courts below have decided an important question of federal law in conflict with applicable decisions of this Court and of decisions of other courts of appeal.

It was stipulated by the parties and established by undisputed evidence, including recognition by the Department of Commerce in its Nautical Chart 877-SC, that petitioner's canal was its private property, owned and maintained by it, lying wholly within its premises, and used for the essential purpose of bringing to its plants for use in the manufacture of its products large quantities of seawater from the Gulf of Mexico.

The almost-pure seawater was obtained from the Gulf by skimming off the brackish waters of the Intracoastal Canal, which runs between the canal and the Gulf, by means of a large skimmer gate across the canal. In its raised position the gate skimmed off the brackish waters.

The public was barred from the canal by this gate, and navigators were on notice by the Department of Commerce Nautical Chart 877-SC that the canal was a private one, privately maintained.

The canal was used also for flotation of the company's barges, and on it two shuttle tugs moved such barges.

These barges were transferred to and from commercial towing tugs by being moved by a shuttle tug through the gate, opened at the time for the vessels' passage, into the Intracoastal Canal waters where the transfers were made.

It was thus established that the waters of the canal were private, the canal *not* being a natural waterway and being owned, used, and maintained wholly by petitioner, public use of the canal having never been allowed since not only company regulations prohibited such use but the skimmer gate, as much an instrumentality of chemical manufacture as any of the company's other machinery, effectively barred from its canal all vessels other than those of the petitioner.

By holding as the Courts below did that since the canal at its seaward end connected with public, commercial waters it itself therefore became "navigable waters of the United States", i.e., public waters, subject to the provisions of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §§ 401 et seq.) and by that Act subject to the control of the United States Secretary of War through the Corps of Engineers, the Courts' decisions are in direct conflict with the controlling decision of this Court in *Leovy v. United States,* 177 U.S. 621 (1900).

In this *Leovy* case the trial court's charge that

> ". . . a navigable water of the United States . . . is a navigable water which, either of itself, or *in connection with other water,* permits a continuous journey to another state." (Emphasis supplied.)

was expressly rejected as not a correct statement of the law, this Court pointing out that under such a definition

all of the flowing waters of the United States would be within the control of the United States' authorities and prevent use of small channels without the risk of persons using them without the permission of the Secretary of War being subject to fines and imprisonment.

This Court has long emphasized that the test to determine whether waters are within the federal statutory control as "navigable waters of the United States" is not only whether they are navigable in fact but also whether they are so navigable *"in their ordinary condition"*, as the matter is put in *The Daniel Ball,* 10 Wall. (70 U.S.) 557 (1871), or the waterway is capable *"in its natural state"* of navigation, using the language of this Court in *The Montello,* 20 Wall. (87 U.S.) 430 (1874). The continuing authority of these decisions is emphasized in *United States v. Cress,* 243 U.S. 316 (1917).

Here of course the "natural state" of petitioner's canal was *land,* no waterway at all. It had never been dedicated to the public, since the skimmer gate is an integral part of the company's manufacturing plant. How then if these decisions be the law can this private canal be found "navigable waters of the United States", i.e., public waters, subject to the Rivers and Harbors Act of 1899?

In conformity with these decisions of this Court, and directly contra to the decision below, is the decision of the Court of Appeals for the Second Circuit in *United States v. President, etc. of Jamaica & R. T. Co.,* 204 Fed. 759 (1913). In that case the Court of Appeals held that a canal dug on private property between a village and tidal waters, and on which the public was allowed on payment of tolls, was private and not public property and the defendant could do with it as it pleased without first obtaining governmental permission.

Further, here the canal was an integral part of petitioner's plant, essential to its company operations. The public had never been permitted use of this portion of the company's properties: The gate across the canal barred public entry. In most essential respects it was like the roadway within the tract of land owned by the United States held by the Court of Appeals below to be *private property* and *not* within a Texas statute as to an accident occurring on this roadway lying wholly within the United States' owned premises. *O'Sullivan v. Brown*, 171 F.2d 199 (5 Cir. 1948).

The controlling legal principle under the circumstances of the instant case is succinctly stated in 13 American Jurisprudence 2d, *Canals*, §4, at page 472

> "A proprietor of a tract of land has an absolute right to excavate entirely within his boundaries and exclusively at his own expense a private canal for purposes of navigation.",

citing as supporting authority *Harvey v. Potter*, 19 La. Ann. 264 (La. Sup. Ct. 1867).

A Texas case of similar holding, dealing with an owner's right to unfettered use of his truck yard, is *Lutcher & Moore Lumber Co. v. Dyson*, 30 S.W. 61, 63 (Tex. Civ. App. 1895).

This Court has itself often held that an owner has the unfettered right to use his private property as he chooses, subject only to the restraints necessary to secure the common welfare. *Terrace v. Thompson*, 263 U.S. 197, 215 (1923); *State of Washington v. Roberge*, 278 U.S. 116, 121 (1928); and *Sterling v. Constantin*, 287 U.S. 378, 396 (1932).

Quite recently the Court has upheld this fundamental right of ownership in *Lloyd Corporation, Ltd. v. Tanner*, ___ U.S. ____, 92 S.Ct. 2219 (1972), where a shopping center owner's right to prevent the public's use of its premises in distributing literature without the center's approval was affirmed.

The late Mr. Justice Holmes years ago put the issue here in clear language:

> "But what are the rights of ownership? They are substantially the same as those incident to possession. Within the limits prescribed by policy, the owner is allowed to exercise his natural powers over the subject matter uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all, and is accountable to no one . . ." *The Common Law*, p. 246, of Lecture VI.

With respect, the Court of Appeals has, if one examines closely the cases it purports to follow, confused the question of admiralty jurisdiction with the rights of an owner of private property, to the latter's loss. Its decision would subject to the control of the Corps of Engineers all private waters in the United States, except swimming pools, for directly or indirectly every waterway in the United States connects with navigable waters, as this Court pointed out in *Leovy v. United States, supra.*

2.

In holding petitioner's private canal subject to the provisions of the Rivers and Harbors Act of 1899, because it connects with public waters, and thus holding its use subject to the control and permission

of the Secretary of War (Corps of Engineers), the Courts below have judicially taken from petitioner its private property for public use without just compensation, contrary to the terms of the Fifth Amendment to the Constitution of the United States and to applicable decisions of this Court.

Here as stated the canal is owned and maintained and used only as a private waterway from which the public is effectively barred physically by a permanent but movable gate.

The Rivers and Harbors Act of 1899, it is respectfully submitted, governs only *public* waterways, not private.

The distinction between private and public waters has been made abundantly clear in numerous decisions of this Court. These are reviewed carefully in *United States v. Cress*, 243 U.S. 316 (1917), which points out that a waterway which is ". . . capable *in its natural state* of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." And it cites numerous cases which hold that no public easement beyond use in the natural state can arise ". . . save by condemnation, with appropriate compensation for the private right".

Here in its *natural state* there was no stream or waterway, only the tract of land out of which the canal was dug, and there has never been any public use and of course no condemnation or compensation for a use which has never been had.

How therefore consonant with the decisions of this Court can this canal be held as did the Courts below

to be "navigable waters of the United States" as those words are used in the Rivers and Harbors Act of 1899 and so subject to governmental control this private canal?

How can it be argued that thus subjecting petitioner's property to use only with the permission of the Corps of Engineers under the provisions of that Act, with all the penalties attached to any use without having first secured that permission, is not a taking without compensation forbidden by the Fifth Amendment?

Is not this prevention of use without governmental permission as direct a taking as was declared by this Court to be forbidden by the Fifth Amendment in *United States v. Great Falls Manf'g. Co.*, 112 U.S. 645 (1884), *United States v. Lynah*, 188 U.S. 445 (1903), and *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), where in the first of these cases stricken down as unconstitutional was no direction to take the particular property but a direction to do that which resulted in a taking, in the second a navigational alteration which would cause a flooding of the riparian owner's land, and in the third a public work which would destroy the land for agricultural use?

There is no showing here that the United States desires to condemn or supervise the use of petitioner's property. Yet the decisions below would make public waters out of a private canal, prevent the use of its property by petitioner without the permission of the Corps of Engineers under pain of civil and criminal penalties, and thus take away from petitioner its invaluable right of ownership, its rights of unrestricted use, without compensation or the right to require compensation.

CONCLUSION

Certainly the decisions of the Courts below should therefore be reversed as holdings contrary to the prohibitions of the Fifth Amendment.

A writ of certiorari should be granted to review the decision of the United States Court of Appeals herein.

Respectfully submitted,

ROBERT EIKEL
Counsel for Petitioner
1442 Esperson Building
Houston, Texas 77002

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3413
Summary Calendar*

THE DOW CHEMICAL COMPANY,
Plaintiff-Appellant-
Cross Appellee,

versus

DIXIE CARRIERS, INC.,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Southern District of Texas

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(July 5, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

BROWN, Chief Judge: Dow Chemical Company brought an action in admiralty against Dixie Carriers

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

for damages to the fender works resulting from three separate collisions between barges under tow by a Dow tug demise chartered to Dixie and a railroad bridge fender system construed by Dow on its barge canal at Freeport, Texas. Both parties appeal from the District Court's $17,055 judgment in favor of Dow. We affirm.

Dixie's primary argument is that the terms of the time charter generously provide it with absolute immunity against all liability for collision damage, including that resulting from its own negligence.[1] But that sort of extraordinary exemption from legal responsibility "can arise only from the plainly expressed intention of the parties, manifested by language couched in unmistakable terms," not from "the unilateral contention of one party

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1. Article VII of the charter reads as follows:
"Dixie shall not be liable for any loss, damage, delay or injury to Dow's operation or Dow's property caused or arising from acts of God, perils of the sea or other waters, or of navigation, *collision*, standing, grounding, jettison, or wreck; fire or explosion from any cause whatever occurring on board or on shore; fault or barratry, *except negligence of the master, crew or other servants of Dixie;* public enemies, arrest, seizure, or detention by governmental authority or legal process; strikes, riots, lock-outs, stoppage of labor, or labor troubles of Dow or Dixie; unseaworthiness, latent defects in machinery or appurtenances of the vessel, or accidents or derangements to machinery or appurtenances where such failure is not due to the lack of ordinary care in making necessary repairs and maintenance of such machinery or appurtenances; and, without limiting the foregoing in any way, any other cause not due to the fault or neglect of Dixie, its servants, or employees. *Dixie agrees it will indemnify and save harmless Dow from all losses due to negligence of Dixie, its agents, servants or employees, arising through or in connection with the performance of this time charter.* Dow agrees that it will indemnify and save harmless Dixie from all loss due to the negligence of Dow, its agents, servants, or employees, arising through or in connection with the performance of this time charter."
(Emphasis added.)

that it meant to impose unlimited liability on the other side." *Lanasse v. Travelers Insurance Co.*, 5 Cir., 1971, 450 F.2d 580, 584, *cert. denied*, 1972, ___, ___ S.Ct. ___, ___ L.Ed2d ___ [40 U.S.L.W. 3542, May 16, 1972] and cases cited therein. Given the equivocal language here, and reading it "against the background of other indicia of the parties' intention,"[2] we must conclude that the District Court's interpretation (that Dixie was exempt from all liability for collision damage *except* that resulting from "negligence of the master, crew or other servants of Dixie") is the only reasonable one.

Dixie also challenges the finding that Dow's failure to secure approval from the Secretary of the Army and the Chief of Engineers for construction of the fender system, while technically violative of sections 9 and 10 of the Rivers and Harbors Act, 33 U.S.C.A. §§401, 402, did not cause or contribute to any of the collisions. Baldly stated, the contention is that Dow is liable if the fenders "caused" the collisions and that they were a "cause" since the barges collided with them. However, unlike the cases cited by Dixie,[3] there is no proof in the

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2. United States v. Seckinger, 1970, 397 U.S. 203, 212, n. 17, 90 S.Ct. 880, 886, 25 L.Ed.2d 224, 234, *reversing and modifying in part*, 5 Cir., 1969, 408 F.2d 146.

3. See, e.g., Atlee v. Northwestern Union Packet Co., 1875, 88 U.S. 389, 22 L.Ed. 619; Humble Oil and Refining Co. v. Tug Crochet, 5 Cir., 1970, 422 F.2d 602; Seaboard Airline Railroad Co. v. Pan American Petroleum & Transport Co., 5 Cir., 1952, 199 F.2d 761, 1952 A.M.C. 1934, *cert. denied*, 1953, 345 U.S. 909, 73 S.Ct. 649, 97 L.Ed. 1344; The Fort Fetterman v. South Carolina State Highway Department, 4 Cir., 1958, 261 F.2d 563, *on appeal following remand*, 4 Cir., 1960, 278 F.2d 921, *cert. denied*, 364 U.S. 910, 81 S.Ct. 272, 5 L.Ed.2d 225; F.S. Royster Guano Co. v. Outten, 4 Cir., 1920, 226 F. 484; United States v. Norfolk-Berkly Bridge Corp., E.D. Va., 1928, 29 F.2d 115; William B. Patton Towing Co. v. Spiller, Tex. Civ. App., 1969, 440 S.W.2d 869.

record here that the fender system actually obstructed navigation, that it was inherently hazardous, or that any change in its design or placement would have prevented the collisions. More importantly, as found by the District Court, Dixie's crew was familiar with the peculiar characteristics of the canal and had navigated through the bridge opening and fender system in both directions on many previous occasions. Clearly the Court concluded that the collisions would not have occurred if Dixie had not been negligent — and that conclusion inescapably involved an assessment of navigation in the face of well-known conditions imposing no extraordinary hazards or difficulties.[4] The record refutes any suggestion that the fender system "caused or contributed to" the collisions simply by being there.[5]

Finally, Dixie maintains that many of the District Court's findings regarding the negligence of her crew in operating and maintaining the vessel are erroneous, particularly the refusal to characterize a malfunctioning generator as a "latent defect" within the meaning of the charter terms (see note 1, *supra*). This is merely one more instance for the application of F.R.Civ.P. 52(a) in its

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4. Significantly, because of Dow's statutory violation the Trial Judge declined to apply the usual presumption of fault against the vessel colliding with a fixed object and imposed on Dow the burden of proving negligence.

5. Dixie's argument confuses negligence with causation. Although it might be argued that Dow's statutory violation rendered it presumptively liable for damages resulting from collision unless it established that the violation could not have caused or contributed to the collision, The Steamship Pennsylvania v. Troop, 1874, 86 U.S. 125, 22 L.Ed. 148, that rule cannot "be pressed to such an extreme as to justify a division of damages when the accident was undoubtedly due to the negligence of an offending vessel whose actions could not be anticipated." Webb v. Davis, 4 Cir., 1956, 236 F.2d 90, 93.

seagoing form—the findings are not clearly erroneous and must be affirmed. *Lanasse v. Travelers Insurance Co., supra; Ohio Barge Line, Inc. v. Oil Transport Co.,* 5 Cir., 1960, 280 F.2d 448, 1961 A.M.C. 375.

Dow's appeal—if it really is an appeal from a judgment,[6] rather than a disagreement with the Trial Court's opinion—results primarily from the determination that its private barge canal constitutes "navigable water of the United States" subject to regulation under the Rivers and Harbors Act. Like the District Court, we conclude that the characterization of the canal as "public" or "private" is irrelevant. *McKie v. Diamond Marine Co.,* 5 Cir., 1953, 204 F.2d 132, 135; *Dagger v. U.S.N.S. Sands,* S.D. W. Va., 1968, 287 F.Supp. 939, 942; *Guilbeau v. Falcon Seaboard Drilling Co.,* E.D. La., 1963, 215 F,Supp. 909, 911. The evidence relating to Dow's use of the canal for the purpose of transporting substantial quantities of shell, chemicals and finished products to and from its two plants on a daily basis provides more than ample support for the conclusion that the canal was an instrumentality of interstate commerce subject to Congressional regulation under the Act. *Levy v. United States,* 1900, 177 U.S. 621, 20 S.Ct. 797, 44 L.Ed. 914.

Dow also maintains that it was entitled to prejudgment interest computed from the date of the collisions, contending that the District Court's discretion to deny such interest must be based upon the existence of peculiar circumstances. *Alcoa Steamship Co. v. Charles Ferran & Co., Inc.,* 5 Cir., 1971, 443 F.2d 250, 256, *cert. denied,* ___U.S.___, ___S.Ct.___, 30 L.Ed.2d 94; *American*

6. The determination did not hurt Dow, since it successfully shouldered a burden it did not otherwise have. See note 4, *supra.*

Zinc Co. v. Foster, 5 Cir., 1971, 441 F.2d 1100, *cert. denied*, ____U.S.____, ____S.Ct.____, 30 L.Ed.2d 95; *Sinclair Refining Co. v. SS Green Island*, 5 Cir., 1970, 426 F.2d 260. Granting the soundness of this principle as a general rule, we nevertheless believe that the circumstances of this case—including the serious and genuine dispute regarding ultimate liability contested in good faith by Dixie and the relative uncertainty of many of the legal and factual issues to be resolved, added to a mutual fault finding as to one of the collisions—provided the experienced and capable District Judge with an adequate basis for awarding interest only from the date of judgment. *Kawasaki Zosensho v. Consulich Societa Triestina Di Navigazione*, 5 Cir., 1926, 11 F.2d 836, 838; *Chitty v. M/V Valley Voyager*, 5 Cir., 1969, 408 F.2d 1354, 1358. On this record his decision should not be overturned. *Dyer v. National Steam Navigation Co.*, 1886, 118 U.S. 507, 30 L.Ed. 153.

AFFIRMED.

APPENDIX B

DOW CHEMICAL COMPANY,
Plaintiff,

v.

DIXIE CARRIERS, INC.,
Defendant.

Civ. A. No. 69-H-214.

United States District Court,

S. D. Texas,

Houston Division.

Aug. 26, 1971.

Robert Eikel, Eikel & Davey, Houston, Tex., for plaintiff.

C. L. Solomon, Hinds & Meyer, Houston, Tex., for defendant.

BUE, District Judge.

MEMORANDUS OPINION

This is an admiralty collision action for damages resulting from three separate incidents, all of which occurred when a barge in the tow of the tug, DOW HUSTLER, collided with a railroad bridge's fender system at a point where the bridge crosses diagonally over a privately owned barge canal. The tug was owned and demise chartered by Dow Chemical Company (Dow) to Dixie Carriers, Inc. (Dixie), and it was then operated by Dixie for the ex-

clusive use of Dow in and around Dow's barge canal pursuant to a time charter. The barge canal which is more than five miles long, approximately 100 feet wide and 12 feet deep is located at Freeport, Texas, and it connects the two Dow plants located at opposite ends of the canal with the Intracoastal Waterway which, in turn, gives access to the Gulf of Mexico. A "skimmer gate" separates the Dow barge canal from the Intracoastal Canal. This "skimmer gate" is visible above the water when the gate is raised or closed, and it is dropped a number of feet below the surface when it is opened to permit barges and other vessels to enter or leave the barge canal.

The plaintiff seeks to recover damages in the amount of $17,305 which reflect the total costs allegedly incurred by Dow in repairing and replacing the damaged fender system. The parties have stipulated that the barges actually did strike the fender system at the bridge site on the three occasions. It is uncontested that this cause is within the admiralty and maritime jurisdiction of this Court pursuant to 46 U.S.C. § 470. What is contested is Dow's contention that Dixie's negligence caused the collisions and Dixie's position that Dow's bridge system is an unlawful obstruction to navigation and that Dow has no valid basis for recovery anyway, either as a consequence of its own negligence or under the terms of the charter party. As is frequently the case in maritime collision litigation, there is considerable inconsistency in the testimony obtained from certain of the witnesses. Accordingly, this Court has been obligated to weigh carefully the credibility of the witnesses rendering such disparate versions and to select the more probable account in the light of the other proof forthcoming at the trial.

[1] Dow initially relies upon the well established presumption in admiralty law that a moving vessel which strikes a vessel at anchor or a fixed object is presumptively at fault. The Oregon, 158 U.S. 186, 187, 15 S.Ct. 804, 39 L.Ed. 943 (1895); The Victor, 153 F.2d 200, 202 (5th Cir. 1946); Placid Oil Co. v. S. S. Willowpool, 214 F.Supp. 449, 451 (E.D. Tex. 1963); Continental Oil Co. v. M. S. Glenville, 210 F.Supp. 865, 867-868 (S.D. Tex. 1962). However, Dixie counters with the assertion that since the fender system is an unlawful obstruction to a navigable waterway pursuant to the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, Dow is presumptively at fault and must prove, as owner of the unlawful obstruction, that the statutory violation could not have caused or contributed to the collision. Dow openly admits that no permit was sought from any governmental agency for construction of the questioned structures, but it contends that the Rivers and Harbors Act does not apply to privately owned artificial waterways such as its barge canal which it owns, maintains and exclusively operates.

[2, 3] Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 402, recite that it is unlawful to construct a bridge or create any other obstruction to the navigable capacity of any of the navigable waters of the United States which is not authorized by Congress and for which structural plans have not been approved by the Chief of Engineers and the Secretary of the Army. The purpose of this statute can be stated thusly:

> The requirement of the various statutes in this respect is based upon the theory that the public highways and navigable streams belong to the public, and it is to protect the public in the enjoyment of such

> right that it is made unlawful to obstruct either a navigable stream or a public highway. Any obstruction not authorized by legislative authority is therefore deemed a nuisance.

F. S. Royster Guano Co. v. Outten, 266 F. 484, 486 (4th Cir. 1920). The Act is premised on the constitutional power of Congress to regulate interstate commerce. See Leovy v. United States, 177 U.S. 621, 632, 20 S.Ct. 797, 44 L.Ed. 914 (1900). A privately owned canal is within the term "navigable water of the United States" if it, in fact, supports interstate commerce. *See* United States v. Banister Realty Co., 155 F. 583 (C.C.E.D. N.Y. 1907); United States v. Doughton, 62 F.2d 936 (4th Cir. 1933); 33 Op. Atty. Gen. 428 (1923). *See also* United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940); The Montello, 20 Wall. 430, 22 L.Ed. 391 (1874); McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953); Gulf & I. Ry. Co. of Texas v. Davis, 26 F.2d 930 (S.D. Tex. 1928), aff'd, 31 F.2d 109 (5th Cir. 1929); The Lucky Lindy, 76 F.2d 561 (5th Cir. 1935); North American Dredging Co. of Nevada v. Mintzer, 245 F. 297 (9th Cir. 1917); D'Albora v. Garcia, 144 So.2d 911 (La. Ct. App. 1962). *Compare* United States v. President, etc., of Jamaica & R. Turnpike Co., 204 F. 759 (2d Cir. 1913).

[4] In the present case, supplies and goods were constantly being transported by barge to and from the two Dow chemical plants with all such movements being made through the sole use of Dow owned tugs. There was testimony that the DOW HUSTLER made from two to six or eight trips per day on the canal pushing shell and chemical or other barges. These included transporting the fin-

ished products of a second concern, located on the waterway, The A. P. Green Co., which were also moved by barge on the waters of the canal to and from the Intracoastal Waterway and thus into interstate commerce. Although there is surprisingly little case authority on the precise point, this Court can reach only one considered conclusion—that the Dow barge canal by virtue of its link with interstate commerce and as a consequence of the character of its commercial use at all times material to this suit is subject to the Rivers and Harbors Act and that the bridge and fender system, because of Dow's failure to satisfy the statute (33 U.S.C. § 401 et seq.), is an unlawful obstruction to the navigation of the canal. Both parties cite the 1923 opinion of the Attorney General as supportive of their respective positions. However, a close reading of that opinion clearly reveals that approval by the Secretary of War was viewed as necessary for construction of a bridge when erected over private canals on which interstate commerce moves. That being so, certain consequences follow insofar as the burden of proof in a collision case involving such an alleged obstruction is concerned.

[5] In United States v. Norfolk-Berkley Bridge Corp., 29 F.2d 115, 125 (E.D. Va. 1928), the applicable rule was stated as follows:

> While such [an unlawful] structure may not be injured negligently by a passing vessel with impunity, nevertheless the vessel which strikes it is not presumptively negligent or careless, but the bridge owner is presumptively at fault, unless he can show that the failure to comply with the requirements was not one of the factors or causes which contributed to the injury.

As a result, the usual presumption which dictates that a moving vessel striking a fixed object is at fault is of no avail to Dow in this instance, and it must establish affirmative acts of negligence, or inferences thereof, of the tug's crew in order to recover from Dixie. *See* Savannah & N. Y. Transp. Co. v. Klaren Bridge Co., 252 F. 499 (4th Cir. 1918). Additionally, Dow must overcome the presumption against it by affirmative demonstration as a consequence of all of the proof at the trial that its statutory violation (failure to obtain a permit pursuant to the Rivers and Harbors Act) could not have contributed to the collision.

[6] Dixie contends that its motion for judgment at the close of the plaintiff's case should have been granted, since Dow failed to satisfy its burden of making out a prima facie case as to the tug crew's negligence. Were Dow relying solely on the presumption of fault normally arising to implicate a vessel when it strikes a fixed object, there would be merit to this position, as Dow's own statutory violation stripped it of any access to or benefit from such a presumption. However, the plaintiff's case as a whole, while admittedly not extensive, goes further than that and sufficiently satisfies its burden of going forward. This is done by raising the issue of the crew's negligence, particularly through the introduction into evidence of the entries in the tug's logbook:

> 0025 hit R. R. bridge fenderworks with [sic] barge MS607 when generator on boat went dead leaving no lights or steering power.[1]

A tug does not lose its generator capacity and concur-

1. Plaintiff's Exhibit No. 10 (entry of April 27, 1967).

rently its rudder power to control its tow in the absence of extraordinary circumstances compelling the offering of some rational explanation. Such a prima facie showing of fault was thereafter firmly established as the negligence of Dixie through cross-examination of its witnesses. Similarly, the testimony of Dow's witnesses pointed up that its statutory violation did not contribute to the collision, a factor which was amply corroborated by Dixie'e witnesses as the proof developed. Accordingly, Dixie's motion for judgment which was repeatedly urged at the trial and thereafter scrutinized closely by this Court is found to be lacking in substance and is therefore denied.

[7] The issue as to the non-contributory nature of Dow's statutory violation was the subject of extensive proof at the trial. There was no persuasive evidence forthcoming from any source that the bridge or fender system was hazardous, or, that it, in fact, obstructed the navigation of the canal at times material to this lawsuit. *See* F.S. Royster Guano Co. v. Outten, 266 F. 484 (4th Cir. 1920); William B. Patton Towing Co. v. Spiller, 440 S.W.2d 869, 872 (Tex. Civ. App.—Houston 1969, no writ). There was no indication in the proof that a change in the structure of the bridge or fender system would have prevented the collisions. *See* The Fort Fetterman v. South Carolina State Highway Dept., 261 F.2d 563 (1958), modified, 268 F.2d 27 (1959), aff'd after remand, 278 F.2d 921 (4th Cir.), cert denied, 364 U.S. 910, 81 S.Ct. 272, 5 L.Ed.2d 225 (1960); Wilmington Transp. Co. v. Standard Oil Co., 53 F.2d 787 (9th Cir. 1931). Further, this is not a case in which the crew of the tug could not know the precise conditions which they had to meet in navigating by the structure. *See* United States v. Norfolk-Berkley

Bridge Corp., *supra*. Instead, Dow presented significant evidence that Dixie's crew on this tug had been handling barges and passing through this very bridge opening and fender system in both directions for many years with but one occurrence of any note taking place apart from the three incidents made the basis of this suit. In other words, Dixie's tug crew were fully familiar with the various characteristics of this small waterway, none of which had constituted a hazard to navigation in the past. As a consequence, this Court finds that Dow has satisfied the burden placed upon it to demonstrate that the statutory violation in failing to obtain a permit for the bridge and fender system could not have caused or contributed to the collisions in question.

[8] Before proceeding to a consideration of the affirmative acts of negligence alleged against Dixie by Dow, certain provisions of the time charter should be noted. Dixie takes the position that as the charterer it is exempted from liability for losses caused by navigation and collision as those terms are set out in Article VII of the time charter. In other words, it is first asserted that the circumstances of the three collisions do not fall within the liability provisions of the charter party, regardless of the fault or negligence of Dixie. Although the charter language is not a model of clarity in this instance, this interpretation of the instrument cannot be accepted. A proper construction of the language of the charter when viewed overall would indicate that Dixie was exempt from liability from the above causes "except [for] negligence of the master, crew or other servants of Dixie. * * *"[2]

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2. Paragraph VII of the time charter provides that:
Dixie shall not be liable for any loss, damage, delay or injury to DOW's operations or DOW's property caused or arising from

The charter party further recites that "unseaworthiness, latent defects in machinery or appurtenances of the vessels, or accidents or derangements to machinery" which result in damage are also excluded from liability unless the failure is due to lack of ordinary care in making necessary repairs. *Compare* The Interports No. 767, 92 F.2d 601 (2d Cir. 1937); Berwind White Coal Mining Coal Co. v. United States, 15 F.2d 366 (2d Cir. 1926); Davison Chemical Corp. v. The Henry W. Card, 144 F.2d 705 (2d Cir. 1944). With these various factors in mind, it is appropriate to consider a chronological assessment of the cause or causes of each of these three incidents.

I.

[9, 10] The April 27, 1967, collision occurred while the DOW HUSTLER was pushing only one barge, the MS 607. The barge struck the fender system after a

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acts of God, perils of the sea or other waters, or of navigation, collision, stranding, grounding, jettisoning, or wreck; fire or explosion from any cause whatsoever occurring on board or on shore; fault or barratry, except negligence of the master, crew or other servants of DIXIE; public enemies, arrests, seizure, or detention by governmental authority or legal process; strikes, riots, lockouts, stoppage of labor, or labor troubles of DOW or DIXIE; unseaworthiness, latent defects or appurtenances of the vessels, or accidents or derangements to machinery or appurtenances, where such failure is not due to lack of ordinary care in making necessary repairs and maintenance of such machinery or appurtenances; and, without limiting the foregoing in any way, any other cause not due to fault or neglect of DIXIE, its servants, or employees. DIXIE agrees it will indemnify and same harmless DOW from all losses due to the negligence of DIXIE, its agents, servants or employees, arising through or in connection with the performance of this time charter. DOW agrees that it will indemnify and save harmless DIXIE from all loss due to the negligence of DOW, its agents, servants, or employees, arising through or in connection with the performance of this time charter.

Pre-Trial Stipulation No. I, Exhibit No. 2, at 3-4.

generator aboard the tug allegedly failed, thereby causing a loss of the rudder power as the tug lined up its tow to proceed inbound through the bridge opening. This collision falls within the liability provisions of the charter party implicating Dixie for its own negligence, unless, as it strongly contends, the generator failure can be categorized as a latent defect in machinery unaccompanied by any lack of ordinary care in making necessary repairs by the Dixie crew on board the DOW HUSTLER. The evidence forthcoming at the trial revealed that the failure of the generator was a consequence of the generator brushes working loose and eventually out of their proper position. The tug's captain, Captain Maier, testified that the generator functioned properly after the collision when the brushes were pressed down into place through the use of a screwdriver. Dixie asserts that this fact situation constitutes a latent defect within the meaning of such provisions of the charter party. This Court cannot apply the concept of latent defect to such circumstances.

In The Bill, 47 F.Supp. 969 (D.Md. 1942), aff'd *sub nom.*, Lorentzen v. Brazil Oiticia, Inc., 145 F.2d 470 (4th Cir. 1944), it was pointed out that a latent defect is one that cannot be discovered by any known and customary test. As a result, the Court held that a hole in the bilge pipe of a vessel caused by the corrosive effect of foreign substance resulting from ordinary use of the vessel, and not by a flaw in the metal, was not a latent defect. A true latent defect is not the result of a gradual deterioration or due to ordinary wear and tear. Ernest Construction Co. v. The Tug Commodore, 294 F.Supp. 15, 17-18 (S.D. Ala. 1968). It must not be discoverable by the exercise of due diligence. Waterman S. S. Corp. v. United States Smelting, Refining & Mining Co.,

155 F.2d 687 (5th Cir.), cert. denied, 329 U.S. 761, 67 S.Ct. 115, 91 L.Ed. 656 (1946). See also The Homer, 99 F.795 (D.Wash. 1900), modified, 109 F. 572 (9th Cir. 1901); The J. N. Gilbert, 222 F. 37 (5th Cir. 1915); Mellon v. Federal Ins. Co., 14 F.2d 997 (S.D.N.Y. 1926); American Co. for International Commerce v. United States, 26 F.2d 468 (S.D.N.Y. 1928); Churchill v. The Altenower, 39 F. 118 (C.C.E.D. La. 1889), appeal dism'd, 149 U.S. 765, 13 S.Ct. 1043, 37 L.Ed. 957 (1892); The Citta di Palermo, 226 F. 522 (E.D. N.Y. 1914), aff'd, 226 F. 529 (2d Cir. 1915). It follows from the above mentioned authorities that a loose brush in a generator is not a latent defect. There was sufficient testimony at the trial to demonstrate persuasively that the crew of the DOW HUSTLER failed to meet its responsibility to exercise due diligence in maintaining, detecting and repairing the generator before the collision and that such failure was a proximate cause of the loss of rudder power on the tug on April 27, 1967, which in turn, proximately caused the damage to the fender system. Regardless of the fact that Dow agreed to reimburse Dixie ultimately for operating expenses incurred under both the demise and time charters, it is apparent that the operation, management and control of the tugboats including the DOW HUSTLER were Dixie's responsibilities.

II.

[11] The April 29, 1967, collision occurred at night while the DOW HUSTLER was pushing another barge, the LTC 26. The barge struck the fender system as the tug passed outbound under the bridge. It is stipulated by the parties that the exit to the fender system on this occasion was blocked by one of Dow's barges

which had apparently broken loose from its moorings at a nearby pier. Dixie contends that Dow was negligent in allowing the barge to block the fender system exit and thus either caused or contributed to the collision. Dow, on the other hand, contends that the crew of the DOW HUSTLER failed to keep a proper lookout. The evidence reflects that at the time of the collision a lookout was stationed on the barge. The tug was equipped with a search light, but, inasmuch as the housing on the tug was being lowered at the time preparatory to passing under the bridge, the light was not being utilized by those aboard to watch the tug and tow's approach to the bridge and fender system. If the search light had been properly used in conjunction with the lookout on the barge, the loose barge in all reasonable probability would have been detected well before the tug and tow entered the fender system. This is so because the photographs introduced into evidence at the trial do not reflect any severe limitation on visibility when approaching the railroad bridge from either direction.[3] As a result, this Court finds that the Dixie crew on board the DOW HUSTLER was at fault in failing to keep a proper lookout and that such fault was a proximate cause of the resulting damages to the fender system. *See* Martin Marine Transp. Co., Inc. v. Jakobson & Peterson, Inc. 135 F.2d 325, 328 (2d Cir. 1943); G. B. Zigler Co. v. Barker Barge Line, 167 F.2d 676, 678 (5th Cir. 1948); Placid Oil Co. v. S. S. Willowpool, 214 F.Supp. 449 (E.D. Tex. 1963). *See also* Tidewater Marine Activities, Inc. v. American Towing Co., 437 F.2d 124 (5th Cir. 1970). However, Dixie was not solely at fault in this instance. Although there was sketchy testimony as to what caused

3. Plaintiff's Exhibit Nos. 3, 4, 5.

an unlighted barge to break loose from the nearby pier, a strong presumption of fault arises as to Dow by virtue of the fact that the barge was inexplicably floating free and blocking the fender system exit. This was not rebutted, and, in fact, it would appear that a securing line was missing. It is undisputed that the care and custody of this barge was Dow's responsibility. Accordingly, this Court finds that Dow is also at fault, that such fault was a proximate cause of the fender damage and that both Dow and Dixie are equally to blame for the collision of April 29, 1967.

III.

[12] The June 3, 1967, collision occurred while the DOW HUSTLER was made up astern of two loaded shell barges, TB 74 and MS 612, which it was pushing in tandem. The second barge made contact with and became entangled in an existing damaged area in the bridge fender system resulting from one of the prior collisions. Dow contends that the crew of the DOW HUSTLER was negligent in making their approach with the flotilla to the bridge and fender system and in improperly securing the two barges end to end with defective or inadequate lines. Dixie contends that the damage resulted solely from Dow's failure to repair promptly and diligently the fender system following the previous collision on April 27, 1967.

The evidence forthcoming at the trial indicated that the barges during the inbound approach to the bridge and fender system either took suction in a shoal area located in the vicinity of the bridge or were otherwise carelessly maneuvered by the tug when lined up for passage through the fender system. As a result, the two barges made contact with the fender on the port side. Although the lead

barge slid by without incident, the impact resulted in the second barge shifting due to an inadequate coupling arrangement so that its port forward corner was exposed. This corner then "hung" in the fender system at a point where the fender had previously been damaged with consequential additional damage. The evidence strongly suggests that this particular fender damage, in all reasonable probability, would not have occurred if the two barges had been properly secured by Dixie's tug crew.

Dixie takes the position, however, that Dow was at fault, since it had, in fact, furnished the coupling gear or lines to the tug and was in overall charge. Dixie cites Tri-Cities Shell & Bldg. Materials Supply Co. v. Welch, 93 F.Supp. 944 (S. D. Tex. 1950), to support its position. Reliance upon *Welch*, is misplaced. In that case the plaintiff was under an obligation to furnish the tug with proper and safe lines. In the present situation Dixie must be viewed as under a contractual duty by virtue of the charter party to use proper gear and to secure the barges properly. That duty was breached. Construed another way, the evidence at the trial clearly reflects that the crew on the tug was negligent in various respects, that is, in failing to maneuver the flotilla with care and in failing to make up the tow properly including the use of faulty or inadequate gear. These faults are found by this Court to be proximte causes of the damage sustained to the bridge fender system on June 3, 1967.

[13] Dixie also asserts that Dow was negligent in not promptly repairing the damage that resulted from the first collision on April 27, thereby permitting a condition to exist which caused the second barge to "hang up" in the fender system. From the evidence adduced at the trial, such a contention is too tenuous to be persuasive. Dow's

senior designer testified that the repairs were accomplished in timely fashion, considering the replacement materials needed and the circumstances under which the repairs had to be made. Job site bids for the repairs were taken within approximately a week of the April 27 collision. The actual repairs were scheduled to commence shortly thereafter. Dixie presented no convincing evidence to substantiate its claim that repairs were arranged for only after the passage of an unreasonable length of time. *See* Southern Pacific Co. v. United States, 250 F. Supp. 912 (E.D. La. 1966). Taking all of the circumstances into account, this Court cannot find that Dixie has made out a valid case so as to indict Dow's actions in this instance.

[14] It is fundamental that the party suffering damage is entitled to recover the amount required to repair and restore the damaged structure to the condition it was in prior to the collision. American Union Transport Co. v. Aguadilla Terminal, Inc., 302 F.2d 394, 396 (1st Cir. 1962); T. H. Browning Steamship Co. v. F. H. Peavey & Co., 235 F.2d 5, 8 (8th Cir. 1956). The parties initially appeared to stipulate the damages and then recanted. At any rate, the fair and reasonable costs incurred in repairing such damages resulting from the three collisions are found by this Court to be as follows:

Collision of April 27, 1967	$ 4,750
Collision of April 29, 1967	500
Collision of June 3, 1967	10,030
Movements of Construction Equipment of Coastal Construction Company (27 times at $75 per occurrence)	2,025
TOTAL	$17,305

Dow has prevailed in its suit for recovery of damages as to all three incidents, although it is found to be equally at fault and must assume one-half of the damages stemming from the second collision of April 29, 1967. Accordingly, taking this factor into account, Dow is entitled to be reimbursed by Dixie for the remaining amount of the reasonable costs expended to repair the fender system which this Court finds to be $17,055 with interest to run from the date of entry of the judgment.

The foregoing constitute the Court's Findings of Fact and Conclusions of Law. Counsel will submit an appropriate judgment within twenty (20) days, incorporating by reference these Findings of Fact and Conclusions of Law and properly assessing Court costs. The clerk will notify counsel.

APPENDIX C

§ 401. Construction of bridges, causeways, dams or dikes generally

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

Mar. 3, 1899, c. 425, § 9, 30 Stat. 1151.

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of

the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151.

§ 404. Establishment of harbor lines; conditions to grants for extension of piers, etc.

Where it is made manifest to the Secretary of the Army that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposite made, except under such regulations as may be prescribed from time to time by him: *Provided*, That whenever the Secretary of the Army grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United

States, he shall cause to be ascertained the amount of tidewater displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tidewater channels between high and low water mark, to such an extent as to create a basin for as much tidewater as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.

Mar. 3, 1899, c. 425, § 11, 30 Stat. 1151.

§ 406. Penalty for wrongful construction of bridges, piers, etc.; removal of structures

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

Mar. 3, 1899, c. 425, § 12, 30 Stat. 1151; Feb. 20, 1900, c. 23, § 2, 31 Stat. 32; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.

§ 407. Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so

granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152.

§ 408. Taking possession of, use of, or injury to harbor or river improvements

It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: *Provided,* That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest.
Mar. 3, 1899, c. 425, § 14, 30 Stat. 1152.

§ 409. Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as

to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

Mar. 3, 1899, c. 425, § 15, 30 Stat. 1152.

§ 411. Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty

days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

Mar. 3, 1899, c. 425, § 16, 30 Stat. 1153.

§ 412. Liability of masters, pilots, and so forth, and of vessels engaged in violations

Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, 686, and 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed

to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

Mar. 3, 1899, c. 425, § 16, 30 Stat. 1153.

§ 414. Removal by Secretary of the Army of sunken water craft generally

Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided,* That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also,* That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible

after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided,* That such bidder shall give satisfactory security to execute the work: *Provided further,* That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States.

Mar. 3, 1899, c. 425, § 19, 30 Stat. 1154.

§ 415. Summary removal of water craft obstructing navigation

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent

any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided,* That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further,* That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

Mar. 3, 1899, c. 425, § 20, 30 Stat. 1154.

§ 502. Criminal liability for failure to alter bridge obstructing navigation

Whenever the Secretary of the Army shall have good reason to believe that any railroad or other bridge over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice

he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of the Army shall forthwith notify the United States attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter in this section mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of the Army, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of the Army in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding $5,000, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed.

Mar. 3, 1899, c. 425, § 18, 30 Stat. 1153; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; June 25, 1948, c. 646, §§ 1, 39, 62 Stat. 909, 992.

§ 549. Report of deterioration in improvements

The Secretary of the Army shall cause the Chief of Engineers of the United States Army, in submitting his annual reports to Congress with regard to works of river and harbor improvement under his charge, to state what

deterioration, if any, has taken place by destruction, decay, obstructions, or otherwise, in connection with any of such works, together with an estimate of the cost of rebuilding or repairing such works, or removing such obstructions; and he shall also cause the said Chief of Engineers to recommend, with his reasons therefor, the discontinuance of appropriations for any river and harbor work which he may deem unworthy of further improvement.

Mar. 3, 1899, c. 425, § 7, 30 Stat. 1150.